IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE STATE OF TEXAS, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. H-12-2718
	§	
D. HOUSTON, INC. d/b/a TREASURES, *et al.*,	§	
	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

The plaintiffs in this action assert that there is no federal question removal jurisdiction and move to remand. The defendants respond that although the only claims asserted seek to abate a nuisance under state law, federal constitutional and statutory issues are necessarily involved. Based on the pleadings; the motion seeking remand and sanctions for improvident removal, the response, and reply; the parties' submissions, and the applicable law, this court grants the motion to remand and awards the plaintiffs their reasonable fees, costs, and expenses incurred in obtaining remand. This case is remanded to the 164th Judicial District Court of Harris County, Texas. The reasons are explained below.

I. Background

On May 16, 2012, the plaintiffs, the State of Texas and the City of Houston, sued the operator of Treasures, a Houston club, in state court. The plaintiffs alleged that the club was a "common nuisance" under § 125.002 of the Texas Civil Practice & Remedies Code. The Code defines a common nuisance as "a place to which persons habitually go for [certain] purposes." TEX. CIV. PRAC. & REM. CODE ANN. § 125.0015 (West 2011). Those purposes include delivery, possession,

manufacture, or use of a controlled substance and prostitution or its promotion or aggravated promotion. *Id.* § 125.0015(a)(4), (6) (citing TEX. HEALTH & SAFETY CODE ANN. § 481.001 *et seq.* (West 2010) (controlled-substances offenses); TEX. PENAL CODE ANN. § 43.01 *et seq.* (West 2011) (prostitution offenses)). The plaintiffs also relied on the Texas Alcoholic Beverage Code provisions that include in the common-nuisance definition a "place where alcoholic beverages are sold . . . or consumed in violation of [the Texas Alcoholic Beverage Code] or under circumstances contrary to the purposes of [the Alcoholic Beverage Code], the beverages themselves, and all property kept or used in the place." TEX. ALCO. BEV. CODE ANN. § 101.70(a) (West 2007); *see also id.* § 81.001 (West 2007 & Supp. 2012) ("In this chapter, 'common nuisance' means a common nuisance as defined by Section 125.001, Civil Practice and Remedies Code, or by Section 101.70(a) of this Code.").

Section 125 of the Texas Civil Practice & Remedies Code allows government officials to sue to abate a common nuisance in their jurisdictions. Relief is available against "a person who maintains" a place that is a common nuisance because of the activities conducted there and who "knowingly tolerates the activity, and furthermore fails to make reasonable attempts to abate the activity." TEX. CIV. PRAC. & REM. CODE ANN. § 125.0015(a). A court may issue a temporary injunction order with "reasonable requirements to prevent the use or maintenance of the place as a nuisance." *Id.* § 125.045(a)(1).

The State and City alleged that the defendants — D. Houston, Inc. d/b/a Treasures; its operator, Nabilco, Inc.; and the premises — knowingly maintained the club as a place where people habitually went for drugs and prostitution. The plaintiffs did not allege any federal-law claims. Instead, in their second amended complaint, the plaintiffs sought an injunction to abate a common

nuisance based on causes of action under Chapter 125 of the Texas Civil Practices & Remedies Code and §§ 81.001 and 101.70 of the Texas Alcoholic Beverage Code.

After a September 2012 injunction hearing, the state court issued an order with extensive requirements intended to address the evidence showing frequent drug use and prostitution at Treasures. The court made the following rulings from the bench on September 10, 2012:

> I want the state background check and the federal background check done on everyone; not just the young ladies, on the employees as well. Everybody who works at Treasures, whether as an independent contractor or an employee, will be subject to this new policy.
>
> . . . .
>
> You're going to turn over those things to the State.
>
> Now, next policy. If anyone has a felony conviction in the last ten years and it's found on that background check, they're fired. Done. I don't care what the felony is. Any felony, you're out of there.
>
> . . . .
>
> Now, next up. There were at least enough hints about drug tests — or drugs so that I would like random drug tests, random drug tests a minimum of twice a month. All reports are to be directed to [Senior Assistant County Attorney Fred] Keys' office, and that's for all employees and independent contractors. Full drug test for every possible drug needs to be sent to Mr. Keys' office. I don't care when you do them, but twice a month they'd better get done. Okay?
>
> And the last and most important portion of this order: Cameras. I know you're shocked by this, but guess what? You're going to hit "Record" on the cameras that you have inside the club, but there are many, many restrictions on this. Number one, after looking at the schematic that we attached, I have made my own — what I like to call Court Exhibit Number 1. I have added places on here where there should be additional cameras, 14 additional cameras.
>
> I understand there's already 12 inside the premises. We're just going to add another 14. I want these cameras turned on at all times that the club is open. I want them to hit "Record." I want now for Treasures to collect a week's worth of tapes and produce those at the end of the week to Mr. Keys' office.

(Docket Entry No. 18, App. 2, Court's Ruling Tr., at 8–10). The plaintiffs submitted a proposed written injunction order.

The defendants filed a notice of appeal in the state court and, on September 11, 2012, filed a notice of removal to this court. The notice stated:

> In their current live pleading, Plaintiffs allege claims that require the application of federal law. That has been especially made true by a pronouncement from the State District Judge of an intention to enter an Order that violates federal law, including a violation of the Fourth Amendment right to be free from unlawful searches and seizures, a violation of Health Insurance Portability and Accountability Act of 1996 (HIPAA), violation of the Electronic Communications Privacy Act of 1986, and the Public Health Services Act.

(Docket Entry No. 1, ¶ 4).

On September 11, 2012, the plaintiffs filed an Emergency Motion to Remand and Motion for Sanctions for Improvident and Wrongful Removal. (Docket Entry No. 2). The defendants responded that the case should not be treated as an emergency, asked for time to respond and brief the issues, (Docket Entry No. 12), and filed a response, (Docket Entry No. 18). The defendants replied. (Docket Entry No. 20).[1] The issues are whether this court has federal-question removal jurisdiction over this case and, if not, whether attorneys' fees should be awarded for improvident removal.

II. The Applicable Legal Standards

As the party invoking federal jurisdiction, the removing party has the burden of proof on a motion to remand. *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *Delgado v. Shell Oil Co.*, 231 F.3d 165, 178 n.25 (5th Cir. 2000); *see also Coury v. Prot*, 85 F.3d

[1] The defendants also moved for leave to file a brief longer than 25 pages. (Docket Entry No. 17). This motion is granted. The defendants moved for a hearing on the motion to remand. (Docket Entry No. 16). This motion is denied as moot. Dina Cardenas, James Cook, Jere Gibbons, Jr., and Nader Nadri moved to intervene. (Docket Entry No. 19). This motion is denied as moot.

244, 248 (5th Cir. 1996) ("[T]here is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court."). To determine whether federal jurisdiction exists, the court looks to the record in the state court at the time of removal. *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 264 (5th Cir. 1995). Because removal jurisdiction raises significant federalism concerns, *Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir. 2002), if there is any doubt that a right to removal exists, "ambiguities are construed against removal," *Manguno*, 276 F.3d at 723.

Two types of actions "arise under" federal law: those in which the plaintiff pleads a cause of action created by federal law, *see, e.g.*, *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.), and those in which the plaintiff pleads a state-law cause of action that implicates significant federal issues, *see Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *accord Singh v. Duane Morris, LLP*, 538 F.3d 334, 338 (5th Cir. 2008).

The first question — whether a claim presents a federal question — depends on the allegations contained in a plaintiff's complaint. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). As the "master of his complaint," *Elam v. Kansas City So. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011), a plaintiff who has a choice between federal- and state-law claims may elect to proceed in state court on the exclusive basis of state law, defeating the defendant's opportunity to remove but taking the risk that any federal claims will be precluded, *see Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (noting that, because the plaintiff is the "master of the claim," "he or she may avoid federal jurisdiction by exclusive reliance on state law"). A federal defense to a state-law claim is not a basis for federal-question jurisdiction. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 328 (5th Cir. 2008); *see also Caterpillar Inc.*, 482 U.S. at 393 ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the

federal defense is the only question truly at issue.").

The second question — whether the state-law claim requires resolution of federal law — is a narrow one. The *Grable* Court described this category of actions that "arise under" federal law to include only those state-law actions that "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." 545 U.S. at 314; *accord Singh*, 538 F.3d at 338. If, as here, the state-court pleading asserts no federal claim, "federal question jurisdiction exists where (1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities." *Singh*, 538 F.3d at 338.

If a case is not removable, the party moving to remand may seek an award of attorneys' fees, expenses, and just costs. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "'Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.'" *In re Enable Commerce, Inc.*, 256 F.R.D. 527, 533 n.14 (N.D. Tex. 2009) (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005)).

> The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove . . . when the statutory criteria are satisfied.

Martin, 546 U.S. at 140.

III. Analysis

A. Remand

The defendants argue that the state court judge's oral rulings from the bench granting relief to the plaintiffs gave rise to a federal question because that relief necessarily implicated federal rights. The defendants assert that the rulings imposed requirements that would violate federal constitutional or statutory rights or limits. As a result, according to the defendants, whether the requirements the plaintiffs sought, and the state court granted, are "permissible" forms of relief depends on whether they violate federal law. (Docket Entry No. 18, § 19).

The defendants give the following examples:

- Requiring that employees and contractors of Treasures submit to twice-monthly drug tests with the results to be delivered to the plaintiffs, and requiring video recordings at Treasures, intended to capture drug use and prostitution, be delivered to the plaintiffs, is legal only up to the Fourth Amendment's limits on reasonable searches, and only within the federal rights under the Americans with Disabilities Act, (ADA), 42 U.S.C. § 12112(d)(4)(A), and the Health Insurance Portability and Accountability Act statute and regulations, (HIPAA), 42 U.S.C. § 1320d-6; 45 C.F.R. pts. 160, 164. (*Id.*, ¶ 22).
- Requiring that Treasures fire, and not hire, any employee who has "any felony" conviction is permissible only to the extent it does not disparately impact minorities so as to violate Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. (*Id.*, ¶ 23).
- Requiring that Treasures obtain federal criminal-background information on employees and turn the results over to the plaintiffs is permissible only to the extent it does not violate the federal Privacy Act, 5 U.S.C. § 552(a). (*Id.*, ¶ 24).

The defendants argue that the injunctive relief sought under the state nuisance statute presents substantial and disputed federal questions. "[W]hether the injunctive relief violates federal law or compliance with such injunctive relief will cause the Defendants to violate federal law, is 'likely dispositive of many [of Plaintiffs'] claims.'" (*Id.*, ¶ 30 (second alteration in original) (quoting *Bobo v. Christus Health*, 359 F. Supp. 2d 552, 557 (E.D. Tex. 2005))).

The problem with this argument is that, under *Grable* and progeny, it is not sufficient that federal rights or defenses are implicated by state-law claims, or that there is a federal-law defense to the state-law claims. "A federal question exists 'only [in] those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Singh*, 538 F.3d at 337–38 (alteration in original) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983)). When a plaintiff does not assert a federal claim in the complaint, there is federal-question jurisdiction if it is clear from the face of the complaint that a federal law that creates a cause of action is an essential component of the plaintiff's state-law claim. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 814 (1986); *Franchise Tax Bd.*, 463 U.S. at 10–11. "[T]he long-settled understanding [is] that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 813.

In *Grable*, a former landowner filed a state court suit to quiet title against the purchases of land at a tax sale, alleging that the notice the IRS provided was legally inadequate. The Supreme Court looked exclusively to the plaintiff's claims when it held that "[w]hether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title *claim*." *Grable*, 545 U.S. at 315 (emphasis added). But the Court also noted that its cases in this area had "sh[ied] away from the expansive view that mere need to apply federal law in a state-law claim will

suffice to open the 'arising under' door." *Id.* at 313.

On this record, whether the plaintiffs have valid state-law claims does not "necessarily" depend on how a court resolves the defendants' Fourth Amendment, ADA, HIPPA, Title VII, and Privacy Act challenges to the relief the plaintiffs requested and the state court judge ordered. The plaintiffs' state-law claims necessarily depend on whether the evidence showed that the elements of the Texas nuisance statute were met so as to support an injunction designed to stop the drug and prostitution activities alleged. The state court did not have to apply federal law to determine whether the plaintiffs have a right to relief on the state-law grounds they invoked. The purported federal constitutional and statutory issues arise only after, and because, the state court first determined that state law entitled the plaintiffs to the relief they sought. The case law is clear that when federal law plays such a role in a case pleaded to raise only state-law claims, there is no federal-question jurisdiction. *See, e.g.*, *Ohio ex rel. Skaggs v. Brunner*, 549 F.3d 468, 476 (6th Cir. 2008) (holding that remand was justified because the federal issue "at most would raise a defense to this action; it would not [constitute] an essential element of the claim.").

The motion to remand is granted.

B. Fees and Costs Under § 1447(c)

The defendants' arguments that the relief granted in the state court may violate federal law are well-researched and well-presented. That same research reveals that the constitutional and statutory challenges raised to the terms of the injunctive relief granted in the state court were defenses to enforcement. Federal-law defenses are not a basis for federal-question removal. *Caterpillar Inc.*, 482 U.S. at 393 ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint . . . ."). Even assuming the federal rights identified existed as described, and even

assuming that they make the challenged parts of the state-law injunction invalid or unenforceable, the plaintiffs' nuisance claims do not "necessarily" state a federal issue. Moreover, to adopt the defendants' argument would disturb the congressionally approved balance of federal and state judicial responsibilities by making many state-court suits involving efforts to abate common or public nuisances into federal lawsuits. The asserted bases for federal-question jurisdiction were objectively unreasonable, given the precedents.

Under 28 U.S.C. § 1447(c), this court grants the plaintiffs their reasonable attorneys' fees, expenses, and just costs incurred in obtaining remand. The plaintiffs must file their application for fees, expenses, and costs no later than October 26, 2012.

IV. Conclusion and Order

The motion to remand is granted because this court lacks subject-matter jurisdiction. This action is remanded to the 164th Judicial District Court of Harris County, Texas. The plaintiffs may recover from the defendants their reasonable attorneys' fees, expenses, and just costs incurred to remand this action. The plaintiffs must file their fee application no later than October 26, 2012.

SIGNED on October 3, 2012, at Houston, Texas.

Lee H. Rosenthal
United States District Judge